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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re N.S., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. R.S. et al., Defendants and Appellants.	D061682 (Super. Ct. No. SJ10344D)

APPEALS from a judgment of the Superior Court of San Diego County, Margie G. Woods, Judge. Affirmed.

I

INTRODUCTION

R.S. and A.B. appeal the juvenile court's judgment terminating their parental rights to their daughter, N.S., and choosing adoption as the appropriate permanent plan. (Welf. & Inst. Code, § 366.26.)[1] The parents challenge the sufficiency of the evidence supporting the

1 Further statutory references are to the Welfare and Institutions Code.

juvenile court's finding that the parent-child beneficial relationship exception to adoption preference (§ 366.26, subd. (c)(1)(B)(i)) does not apply. We affirm.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. *Early Dependency Proceedings*

On December 27, 2010, the San Diego County Health and Human Services Agency (Agency) filed a petition under section 300, subdivisions (a) and (j) on N.S.'s behalf, alleging that there was a substantial risk she would suffer serious physical harm inflicted nonaccidentally. The allegations were based on the fact that in May 2010, N.S.'s brother, C.S.,[2] then only several months old, suffered serious inflicted trauma attributed to shaken baby syndrome, and N.S.'s mother, R.S., was determined to be the most likely perpetrator. The court declared C.S. a dependent and placed him in foster care on December 16, 2010, denying reunification services to R.S. Due to the active case with C.S., a hospital hold was placed on N.S. at her birth, and she was detained two days later. Soon thereafter, C.S. and N.S. were placed together in foster care.

The Agency's detention reports revealed that R.S., the mother of five children, had a well substantiated history of drug use, as a result of which her second- and third-born children already were under a permanent plan of guardianship with the maternal grandmother. R.S. had refused drug treatment and drug testing during the months before N.S.'s birth and had received little prenatal care. In addition, R.S. had a history of domestic violence with multiple partners, including N.S.'s father, A.B. R.S. also had a history of

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2 C.S. is not a part of this appeal.

failing to benefit from services offered, including those related to substance abuse, domestic violence and parenting deficits.

A.B., who is C.S.'s father and was determined to be N.S.'s biological father after paternity testing, has a documented criminal history dating back to 1987, including battery, willful cruelty to a child, DUI, domestic violence and possession of a controlled substance. He was alleged to have been in an abusive relationship with R.S. and been violent toward her older daughter. Before the disposition hearing regarding N.S., A.B. indicated that he hoped he was her father, and that he wanted to participate in reunification services if he was proved to be so. He was allowed services with respect to C.S., and had been participating in a drug treatment program but had not yet begun his required domestic violence program.

The court sustained the allegations of the Agency's petition regarding N.S., and declared her a dependent in April 2011. It denied reunification services to R.S., but approved the Agency's recommended reunification case plan for A.B. R.S. appealed that order, which we affirmed.

In connection with the six-month review hearing, N.S.'s court-appointed special advocate (CASA) reported that R.S. and A.B. had participated in separate supervised visits where they were "appropriate with N.S. and [seemed] to attend to her needs." However, she also reported that A.B. had made minimal progress on his case plan, had refused drug testing, had not accepted personal responsibility for his actions and did "not seem to understand the severity of the incident that brought the children into the system." For this reason, the CASA recommended that services be terminated for A.B. The Agency made the same recommendation. It echoed the CASA's conclusions regarding A.B., noted that he had

relapsed in his substance abuse and tended to blame others for his failure to adhere to his plan and actively participate in services. The Agency also noted that A.B. was tentative and uneasy in his role as a parent, indicated his desire to have R.S. continue to parent his children, notwithstanding her history, and failed to take responsibility for the protective issues.

In November 2011, the court found that returning N.S. to the parents' custody "would create a substantial risk of detriment to [N.S.'s] physical and emotional [well-being]," and that there was "not a substantial probability that [she] will be returned to the [parents'] physical custody." The court also found that A.B. had failed to make substantive progress with his case plan, and it terminated his reunification services. Although A.B. filed a notice of intent to file a writ petition challenging these rulings, this court dismissed the matter after counsel for A.B. indicated there were no viable issues for review.

B. *Section 366.26 Proceedings and the Order Terminating Parental Rights*

In its assessment report for the section 366.26 hearing, the Agency recommended that parental rights be terminated and that adoption become N.S.'s permanent plan. It noted that the foster parents who had cared for N.S. and C.S. since September 2011 wanted to adopt both children, had completed an adoption home study and were recommended for approval. The Agency also explained that while both R.S. and A.B. had successful, positive visits with N.S., their relationship with her was not parent-child, but rather, comparable to a "friendly visitor."

The court held the contested section 366.26 hearing in April 2012. A.B. was present with his counsel, but R.S. appeared only through counsel, even though she had been

personally noticed. The court found by clear and convincing evidence that N.S. was likely to be adopted and that none of the statutory exceptions applied. Accordingly, the court terminated parental rights and referred N.S. to the Agency for adoptive placement.

III

DISCUSSION

A. *The Beneficial Relationship Exception*

At a section 366.26 hearing, the court is charged with determining a permanent plan of care for the minor child. The court may order one of three alternatives: adoption; legal guardianship or long-term foster care. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1231; § 366.26, subd. (b)(1)-(5).) "Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*).) Adoption necessarily involves termination of the biological parents' legal rights to the child. (*Ibid*.) Once the court determines by clear and convincing evidence that a child is likely to be adopted, it becomes the parent's burden to show that termination of his or her rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re C.F.* (2011) 193 Cal.App.4th 549, 553 (*C.F.*); *In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) The exception at issue here applies when the "parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

The trial court's ruling that this exception does not apply is reviewed under the sufficiency of evidence standard. (*C.F.*, *supra*, 193 Cal.App.4th at p. 553; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) "On review of the sufficiency of the evidence, we

presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*Autumn H.*, at p. 576; see also *C.F.*, at p. 553.)

It is undisputed that both R.S. and A.B. have maintained regular visitation and contact with the child. Accordingly, our analysis will focus on the question whether, under the second prong of the exception, the parents have shown that their relationship with N.S. was so beneficial that terminating parental rights would be detrimental to her.

In *Autumn H.*, we interpreted the beneficial relationship to mean that "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) We further explained:

> "In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging to a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid*.)

(See also *In re Casey D.* (1999) 70 Cal.App.4th 38, 50 (*Casey D.*).) Whether the exception applies must be determined on a case-by-case basis. (*C.F.*, *supra*, 193 Cal.App.4th at p. 558; *Autumn H.*, at pp. 575-576.)

The showing required to support the beneficial relationship exception is a substantial one, particularly where, as here, the parents have never lived with the child as the custodial parent. "A biological parent who has failed to reunify with an adoptable child may not

derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466 (*Angel B.*).) Put simply, it is not enough for the natural parent to have "maintained a relationship that may be beneficial to some degree," when that relationship "does not meet the child's need for a parent." (*Ibid*.) "The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs." (*Id*. at p. 467, fn. omitted.)

B. *Application of the Exception in this Case*

Applying the foregoing factors here, we note at the outset that N.S. is not yet two years old, and has been a dependent almost from the day she was born. She was identified as a candidate for dependency at birth, based on the May 2010 incident involving her brother, C.S. She was taken into protective custody two days after birth and has been in foster care ever since. In short, N.S. has never developed a relationship with R.S. and A.B. as her custodial parents. In contrast, she has been with her foster parents—who have been identified as qualified adoptive parents—for approximately one year, and began to establish a relationship with them as her babysitters before that time. There is no evidence that N.S. has any particular needs that the foster parents cannot meet equally as well as, if not better than, R.S. and A.B. Thus, the first, second and fourth *Angel B.* factors do not support application of the beneficial relationship exception in this case. (See *Angel B., supra*, 97 Cal.App.4th at pp. 467-468 [noting child, who was detained in the hospital, had spent

relatively few hours visiting with mother, as opposed to the many hours being parented by her foster family, and did not have any particular needs that only mother could meet].)

R.S. and A.B. focus their challenge to the juvenile court's ruling on the third factor—i.e., the nature of the interactions between child and parents. (*Angel B., supra,* 97 Cal.App.4th at p. 467.) Both parents contend that through their interactions with N.S., they have formed beneficial emotional attachments with her, and that she would suffer detriment if the parental relationship were severed. A.B. argues, for example, that he and his daughter have "shared a positive, loving, familial relationship." R.S. similarly asserts that terminating her rights would deprive N.S. "of a substantial, positive emotional attachment." Although we do not question that the parents' visits with N.S. have been positive for all, the evidence does not bear out the parents' assertions that terminating the parents' rights would be harmful to N.S.

There is no dispute that during their visits with their daughter, both parents were loving, attentive, watchful for N.S.'s safety and engaged with her in play. They both fed her (with food and drink provided by others), and R.S. changed her diapers. N.S. appeared to enjoy these visits and engaged with her parents willingly. The law is clear, however, that such positive interactions in themselves will not overcome the adoption preference when they do not evidence that a "sufficiently *significant* relationship existed between [parent and child] such that termination of parental rights would be detrimental to the child." (*Angel B., supra*, 97 Cal.App.4th at p. 468.)

As explained in *Autumn H.*, it is not enough for the natural parent to occupy a role as " 'friendly visitor' " or " 'family friend.' " (*Autumn H., supra*, 27 Cal.App.4th at p. 576; see

also *C.F.*, *supra*, 193 Cal.App.4th at p. 555 ["A parent must show more than frequent and loving contact or pleasant visits."]; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324 (*Elizabeth M.*) [not enough when mother, "[a]t best, . . . occupied a pleasant place in [child's] life"].) Because "[i]nteraction between natural parent and child will always confer some incidental benefit to the child" (*Autumn H.*, at p. 575), a parent must show more. There must be evidence of such a "significant, positive, emotional attachment" between child and parent that severing it would disrupt the child's life and cause her harm. (*Id.* at p. 575; see also *Elizabeth M.*, at p. 324.)

Such evidence is lacking here. First, neither R.S. nor A.B. has been N.S.'s custodial parent, and their contact has been limited to weekly visits. Thus, completely lacking here is the type of attachment that comes from "day-to-day interaction, companionship and shared experiences." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; compare *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1207 [child had lived with mother for first six and one-half years of his life, expressed a desire to live with her again and there was no other woman in his life with whom he had a beneficial relationship].) A.B. is correct that daily contact is not a prerequisite for application of the beneficial relationship. (See *Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) But what *is* required is the sort of close relationship that "characteristically [arises] from day-to-day interaction . . . ." (*Ibid.*) There simply is no evidence that R.S. and A.B. possess such a relationship with N.S. The Agency's report concluded that R.S.'s and A.B.'s positive interactions with N.S. were comparable to that of "a friendly visitor." As the juvenile court observed, even though N.S. enjoys their visits and their affection, she has "not bonded" with her parents. By contrast, there are indications that

N.S. has developed that type of attachment with her foster parents. Thus, while N.S. has no difficulty separating from R.S. and A.B. at the conclusion of their visits, she does have difficulty separating from her foster parents. N.S. has been in the same foster home with her brother, C.S., since September 21, 2011, and appears to be thriving in that environment. She and C.S. appear happy to see their foster parents after visits—the visitation monitor reported that their "eyes light up" when they reach for their foster father to pick them up.

R.S. initially suggested that there is no requirement that she show she "occupies a parental role in the life of the child." R.S. cited no law supporting this assertion, and in fact, the law is to the contrary, as A.B. concedes. (See, e.g., *C.F.*, *supra*, 193 Cal.App.4th at p. 557 [no evidence that mother occupied a parental role in her children's lives]; *Casey D.*, *supra*, 70 Cal.App.4th at p. 51 [emphasizing the need to show "a parental, rather than caretaker or friendly visitor relationship with the child"]; *Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576 [concluding exception did not apply because relationship was one of friends, not of parent and child].)[3] Perhaps recognizing this, in her reply brief R.S. asserts that the visitation logs state that she consistently demonstrated a "parental" role. It is true that on the logs, the visitation monitor checked the box with the heading "Demonstrates Parental Role," and also noted that R.S. engaged in typical parental activities, such as feeding and diapering

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[3] We think it is revealing that, in making this argument, R.S. urges the court to take into account that she has a supportive extended family, namely, her parents, who can be an "important family resource." In our view, this is at least an implicit concession by R.S. that she does not actually fulfill a parental role with N.S. and may not be able to do so in the future without the support of extended family. But R.S. cites no law that supportive relatives can be a substitute for the intimate bond between *herself* and N.S. that is needed to overcome the preference for adoption, and in any event, she makes no argument that N.S. has any relationship at all with the maternal grandparents.

her children, interacting with them and being attentive to their safety. We do not minimize the importance of such contact, but the fact is, babysitters and family friends engage in such activities as well. It is therefore not simply the acts themselves, but rather, the *quality of the relationship* that arises from that interaction, that determines whether the statutory prerequisites for application of the beneficial relationship exception have been fulfilled. (See *Angel B.*, *supra*, 97 Cal.App.4th at pp. 466, 459, 465 [although mother had regular, successful visits with Angel, it was the foster parents who fulfilled the parenting role; child "should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree, but that does not meet the child's need for a parent"].)

A.B. cites our decision in *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*), as supporting application of the beneficial relationship exception in this case. As we have repeatedly emphasized, however, "*S.B.* is confined to its extraordinary facts." (*C.F.*, *supra*, 193 Cal.App.4th at p. 558.) Present in *S.B.*, but absent here, were facts showing that the father had an "emotionally significant relationship" to his child arising from the father's role as S.B.'s primary caregiver for three years, his diligent and successful efforts to participate in services and maintain sobriety, and compliance with " 'every aspect' " of his case plan. (*S.B.*, at p. 298.) In addition, S.B. had demonstrated a real bond with her father, and she was upset when their visits ended and tried to leave with him. (*Ibid*.) Rather than support

application of the exception here, *S.B.* only serves to highlight the absence of similar indicia of a real parental bond between N.S. and either R.S. or A.B.[4]

In fact, the evidence suggests that A.B., who has never lived with N.S., has demonstrated uncertainty and uneasiness with the parenting role, particularly in more stressful moments such as when C.S. and N.S. are upset. He has indicated that he sees himself more in a coparenting role with R.S., while at the same time acknowledging that such a scenario is "impossible." In general, he believes he is capable of caring for his children only with the assistance of others, such as his mother and sisters. His failure to get control of his substance abuse, his tendency to blame others and accept no real personal responsibility for not following through with his case plan, and his inability or unwillingness to fully come to terms with the protective issues that initially compelled the placement of his children in foster care, all evidence A.B.'s inability to effectively meet N.S.'s parenting needs and militate in favor of adoption.

Similarly, R.S. has never lived with N.S., and indeed, appears to have actively parented only the oldest of her five children (now an adult) for any length of time; the younger ones have all had alternative custodial arrangements due to R.S.'s drug abuse and

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4 A.B. also cites *In re Brandon C.* (1999) 71 Cal.App.4th 1530, but that case is also distinguishable. There, the mother's visits had been more frequent, and unlike this case, one of the children had difficulty separating from his mother after visits. (*Id.* at pp. 1534-1535.) The mother had also participated in her drug treatment program, was gainfully employed and had maintained a stable residence. (*Id.* at p. 1535.) Accordingly, unlike this case, there was substantial evidence in *In re Brandon C.* that mother occupied a true parental role and also had the ability to meet her children's parenting needs. Contrary to A.B.'s suggestion, it is not the lack of a sufficient *quantity* of care and nurturing from A.B. and R.S. that is dispositive here, but rather, the fact that their relationship with N.S. lacks a sufficiently significant parental *quality* to overcome the adoption preference.

domestic violence issues. R.S. has never fully acknowledged her drug abuse and the impact that it has had on her children, nor has she successfully been treated—or even sought treatment—for that problem. The evidence reasonably suggests that R.S. hid her pregnancy with N.S. to avoid drug testing and prenatal care. R.S. resisted drug testing and treatment until after N.S.'s birth, but her participation in a treatment program was interrupted by other medical issues, and there is no evidence R.S. followed through with any other program thereafter. She has shown poor judgment in exposing herself and her children to domestic violence. For example, although she felt threatened by A.B. and afraid for her daughter's safety at one point, she continued to see A.B. and brought C.S. with her. Like A.B., at times R.S. had difficulty during her visits dealing with both children at the same time. Further, as we concluded when we affirmed the denial of reunification services, R.S. has blamed others for her situation, failed to avail herself of offered assistance and was hostile toward those who tried to help her.

Particularly telling, however, is the parents' failure to identify any evidence showing that severing their parental rights would be detrimental to N.S. (as opposed to themselves), so as to outweigh "the security and the sense of belonging [to] a new family" that adoption would confer. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Both the Agency's and the CASA's reports concluded that N.S. would suffer no such harm.[5] To the contrary, they concluded that failing to place her with a permanent adoptive family could result in such harm. Notwithstanding the obvious affection and care the parents have shown for N.S.

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[5] The prospective adoptive parents already have indicated a willingness to allow the parents to continue to visit N.S., thus ensuring the continuity of the benefits N.S. obtains from her interactions with them.

during their respective visits, the evidence convincingly demonstrates that R.S. and A.B. have failed to come to grips with their respective histories of substance abuse and domestic violence, and have failed to actively embrace and benefit from parenting, treatment and other services that might have put them on a path of reunification with their daughter.

In such circumstances, where neither parent has successfully reunified with his or her child, but both have shown positive interaction with the child, the court must determine whether the benefit the child obtains from such contact outweighs the child's need for "a stable, permanent home." (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.) Where, as here, the parents have at most shown a friendship with the child, rather than a parental bond, and the evidence demonstrates that the parents are not capable of providing a reliably and consistently safe and stable home environment, then "the child should be given every opportunity to bond with an individual who will assume the role of a parent." (*Id.* at p. 854.) "To hold otherwise would deprive children of the protection that the Legislature seeks to provide." (*Ibid.*, citing §§ 300, 366.25, subd. (a), 366.36, subd. (b).) The CASA concluded that R.S. and A.B. had not "proven to the Court that they can parent C.S. and N.S. in a safe environment." Similarly, the Agency concluded that adoption will provide N.S. with a "loving, nurturing, safe and permanent environment" where "she can count on her needs being met without struggle and where is afforded consistency and a sense of belonging."

There is, accordingly, substantial evidence supporting the juvenile court's findings that adoption is the appropriate permanent plan for N.S., and that the parent-child beneficial relationship exception does not apply.

IV

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

IRION, J.